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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

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INTRODUCTION

1. At its twenty-ninth session, in 1996, the Commission decided to prepare a legislative guide on build-operate-transfer (BOT) and related types of projects.1/ The Commission reached that decision after recommendations by many States and consideration of a report prepared by the Secretary-General (A/CN.9/424) which contained information on work then being undertaken by other organizations in that field, as well as an outline of issues covered by relevant national laws. The Commission considered that it would be useful to provide legislative guidance to States preparing or modernizing legislation relevant to those projects. The Commission requested the Secretariat to review issues suitable for being dealt with in a legislative guide and to prepare draft materials for consideration by the Commission.

2. At its thirtieth session, in 1997, the Commission had before it a table of contents setting out the topics proposed to be covered by the legislative guide, which were followed by annotations concerning the issues suggested to be discussed therein (A/CN.9/438). The Commission further had before it initial drafts of chapter I, "Scope, purpose and terminology of the *Guide*" (A/CN.9/438/Add.1), chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2) and chapter V, "Preparatory measures" (A/CN.9/438/Add.3). It was pointed out that the annotated table of contents contained in document A/CN.9/438 had been prepared by the Secretariat for the purpose of enabling the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents.

3. The Commission noted the proposal that the draft legislative guide should consider which aspects of the issues mentioned in document A/CN.9/438 should be dealt with in legislation, and which aspects should be left to be addressed by the parties in the agreements concerning the implementation of the project. It was generally felt that the documents submitted by the Secretariat presented a good basis for the work of the Commission in that field.

4. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods for addressing them and considered a number of specific suggestions (see A/52/17, paras. 231-246). The Commission generally approved the line of work proposed by the Secretariat, as contained in documents A/CN.9/438 and Add.1-3. The Commission requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters. The Commission invited Governments to identify experts who could be of assistance to the Secretariat in that task.

5. The Secretariat has revised the documents considered by the Commission at its thirtieth session and has prepared initial drafts of additional chapters with the assistance of outside experts and in consultation with other international organizations. For the purpose of distinguishing the

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1/ Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 225-230.

advice provided by the legislative guide from the background discussion contained therein, it is proposed that each substantive chapter be preceded by the legislative recommendations pertaining to the matters dealt with in the chapter. Drafts of the introduction and of chapters I, II, III and IV are contained in documents A/CN.9/444/Add.1-5. Initial drafts of chapters V-XI are currently being prepared by the Secretariat for consideration by the Commission at its thirty-second session, in 1999.

I. PROPOSED STRUCTURE AND CONTENTS OF THE LEGISLATIVE GUIDE

"Introduction and background information on privately financed infrastructure projects"

6. At its thirtieth session, the Commission considered an initial draft of chapter I, "Scope, purpose and terminology of the *Guide*"(A/CN.9/438/Add.1), which was intended to provide information on the projects covered by, and on the purpose of, the legislative guide, as well as an explanation of terms frequently used therein. The Commission further considered an initial draft of chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2), which contained general background information on the concept of project finance, the parties to a privately financed infrastructure project and the phases of their implementation.

7. In the consultations subsequently conducted by the Secretariat with outside experts and international organizations, it was suggested that the usefulness of the legislative guide would be enhanced by establishing a clearer distinction between those introductory portions and the remaining chapters of the legislative guide, which are intended to contain substantive discussion and legislative advice. For that purpose, the Secretariat has combined the former draft chapters I and II into one single introduction, which takes into account, as appropriate, the suggestions made at the thirtieth session of the Commission in respect of documents A/CN.9/438/Add. 1 and 2 (see A/52/17, paras. 238-243).

8. A draft of the introduction is contained in document A/CN.9/444/Add.1.

Chapter I, "General legislative considerations"

9. In the opening section of chapter I (previously numbered chapter III) it is proposed to discuss two issues concerning the general legal framework for privately financed infrastructure projects, namely, the legislative authorization for the host Government to undertake such projects and the legal regime to which they are subject. The second section of chapter II would consider the possible impact of other areas of legislation on the successful implementation of those projects. The concluding section of chapter II would discuss the possible relevance of international agreements entered into by the host country for domestic legislation governing privately financed infrastructure projects. An initial outline of issues proposed to be covered in chapter I was contained in document A/CN.9/438, paragraphs 6 to 16.

10. At the thirtieth session of the Commission, it was suggested that chapter II should elaborate on the different legal regimes governing the infrastructure in question, as well as on the services provided by the project company, issues in which there were significant differences among legal systems. It was further suggested that attention should be given to constitutional issues relating to privately financed infrastructure projects (see A/52/17, para. 237(a)).

11. A draft of chapter I, which reflects the above suggestions, is contained in document A/CN.9/444/Add.2. It also includes some of the contents of former chapter V, "Preparatory measures" (A/CN.9/438/Add.3).

Chapter II, "Sector structure and regulation"

12. At the thirtieth session of the Commission, it was noted that issues pertaining to privately financed infrastructure projects involved also issues of market structure and market regulation and that consideration of those issues was important for the treatment of a number of individual topics proposed to be covered by the legislative guide. For instance, issues of sector structure (such as the level of competition the host Government wishes to promote in the sector concerned) would affect a governmental decision as to whether to grant exclusivity to one concessionaire or whether to award multiple concessions. Similarly, issues of sector regulation (such as the possible role of a regulatory agency in establishing the quality of services provided by the project company and the prices of those services) would be crucial for establishing an appropriate regulatory mechanism (see A/52/17, para. 235).

13. In order to deal with issues of competition, sector structure and regulation at the level of detail envisaged by the Commission, the Secretariat proposes the addition of a separate chapter. A draft of this chapter is contained in document A/CN.9/444/Add.3.

Chapter III, "Selection of the concessionaire"

14. Chapter III (previously numbered chapter IV) is intended to deal with methods and procedures recommended to be used for the award of privately financed infrastructure projects. An initial outline of issues proposed to be covered in chapter IV was contained in paragraphs 17 to 26 of document A/CN.9/438.

15. At the thirtieth session of the Commission, it was suggested that chapter IV should emphasize that the appropriateness of the selection procedure depended not only on the nature of each individual project, but also on the policy pursued by the Government for the sector concerned. It was also suggested that the legislative guide should discuss issues raised by unsolicited proposals (see A/52/17, para. 237(b)).

16. A draft of chapter III is contained in document A/CN/9/444/Add.4.

Chapter IV, "Conclusion and general terms of the project agreement"

17. In the opening section of chapter IV (previously numbered chapter VI), it is proposed to deal with general considerations concerning the project agreement, discussing in particular the different approaches taken by national legislation concerning the project agreement (from those that scarcely refer to the project agreement to those that contain extensive mandatory provisions concerning clauses to be included in the agreement). The remaining sections would deal with rights and obligations of the project company that, in addition to being dealt with in the project agreement, might be usefully addressed in the legislation, as they might affect the interests of third parties. An initial outline of issues proposed to be covered in chapter IV was contained in paragraphs 29 to 38 of document A/CN.9/438.

18. A draft of chapter IV is contained in document A/CN.9/444/Add.5. It also includes some of the contents of former chapter V, "Preparatory measures" (A/CN.9/438/Add.3).

Chapter V, "Government support"

19. The opening section of chapter V (previously numbered chapter VII) is intended to discuss support measures, incentives and facilities that may be offered by the host Government for the purpose of enhancing the commercial viability of a project, ensuring its technical feasibility or reducing the political or other risks faced by investors and lenders. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 39 to 45 of document A/CN.9/438.

20. At the thirtieth session of the Commission, it was suggested that chapter V should discuss possible manners in which privately financed infrastructure projects could be facilitated with a minimum involvement of governmental guarantees. With regard to forms of governmental support to infrastructure projects, it was suggested that the legislative guide should give attention to specific forms of governmental support, such as facilitation of entry visas and work permits; waiver of immigration or repatriation restrictions for foreign personnel; waiver of currency exchange restrictions (see A/52/17, para. 237(d)).

Chapter VI, "Construction phase"

21. Chapter VI (previously numbered chapter VIII) is intended to discuss issues that arise during the construction of infrastructure facilities, such as the relations between the host Government, the project company and the construction contractors, procedures for monitoring the progress of the construction works and for final inspection and approval of the infrastructure. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 46 to 54 of document A/CN.9/438.

Chapter VII, "Operational phase"

22. It is proposed to consider in chapter VII (previously numbered chapter IX) the main issues relating to the conditions of operation of the infrastructure, such as: the scope and quality of the services provided by the project company; the establishment and adjustment of the price charged by the project company; the relations of the project company with the purchasers of the goods or services or the users of the infrastructure; procedures for monitoring the performance of the project company. This chapter is intended to supplement, on a more practical level, the general analysis of regulatory issues provided in chapter II. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 55 to 66 of document A/CN.9/438.

Chapter VIII, "Delays, defects and other failures to perform"

23. In the opening section of chapter VIII (previously numbered chapter X), it is proposed to deal with the possible consequences of, and remedies for, default by the project company, during both the construction and the operation of the infrastructure. Another section of chapter VIII would consider possible approaches for dealing with events that might preclude the project company, temporarily or permanently, from performing its contractual obligations. The closing section of the chapter would deal with unforeseen events and changes of circumstances, including changes that are brought about by subsequent acts of the host Government. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 67 to 73 of document A/CN.9/438.

24. At the thirtieth session of the Commission, it was suggested that this chapter should consider the desirability and appropriateness of dealing with issues relating to delays, defects and failures to perform in legislation specific to privately financed infrastructure projects (see A/52/17, para. 237(e)).

Chapter IX, "Duration, extension and early termination of the project agreement"

25. It is suggested to discuss in chapter IX (previously numbered chapter XI) the consequences of the expiry of the concession period, the possibility of an extension of the project agreement, and the events or circumstances that may cause or justify its early termination. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 74 to 83 of document A/CN.9/438.

26. At the thirtieth session of the Commission, it was suggested that this chapter should give particular attention to questions such as ownership of infrastructure and related property; responsibility for residual liabilities of the project company; terms of transfer of the infrastructure to the host Government in BOT projects. In addition to that, it was suggested that attention should be given to cases where the host Government might decide to keep the infrastructure permanently under private operation (see A/52/17, para. 237(f)).

Chapter X, "Governing law"

27. Chapter X (previously numbered chapter XII) is intended to deal with the issue of the law applicable to privately financed infrastructure projects and the possible implications of different laws applying to different aspects of the project. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 84 to 87 of document A/CN.9/438.

28. At the thirtieth session of the Commission, it was suggested that this chapter should elaborate on the possibility and the limitations of choice-of-law clauses, taking into account the specific nature of the various contractual arrangements involved, emphasizing the role of choice-of-law clauses in the contracts between the project company and its suppliers and other contractors. It was also suggested to further consider the desirability for the parties to make use of commercial law rules elaborated by international bodies (see A/52/17, para. 237(g)).

Chapter XI, "Settlement of disputes"

29. Chapter XI (previously numbered chapter XIII) is intended to deal with the legislative framework for the settlement of disputes that might arise in connection with privately financed infrastructure projects. An initial outline of issues proposed to be discussed in this chapter was contained in paragraphs 88 to 92 of document A/CN.9/438.

30. At the thirtieth session of the Commission, it was suggested that this chapter should elaborate on the possibility and the limitations of arbitration agreements, taking into account the specific nature of the various contractual arrangements involved.

CONCLUSIONS

31. The Commission may wish to note that the proposed time-table for the Commission's session, as set out in the provisional agenda (A/CN.9/443), provides that the first five days of the session would be devoted to a discussion of the subject of privately financed infrastructure projects. It is suggested that the Commission use this period for an in-depth discussion of the draft legislative guide. The Commission may wish to consider the proposed structure of the legislative guide, as set out above in paragraphs 6 to 30 and take up the introduction and chapters I to IV (addenda 1 to 5 to the present report). The Commission may wish to consider the concept of the draft chapters, whether they cover the relevant issues, whether statements made adequately cover the practical needs of privately financed infrastructure projects and whether the advice given is appropriate. The Commission may wish to consider, where appropriate, the desirability of formulating the legislative recommendations in the form of sample provisions for the purpose of illustrating possible legislative solutions for the issues dealt with in the legislative guide, as was suggested at its thirtieth session (see A/52/17, para. 235).

32. On the basis of its discussion of the draft chapters and of the schedule of meetings of the Commission and its Working Groups during the remainder of 1998 and in 1999, the Commission may further wish to consider the future procedure that should be followed in the preparation of the legislative guide.

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